No. 16,465

United States Court of Appeals

For the Ninth Circuit

UNION PAVING COMPANY, a corporation,
Appellant,

vs.

DOWNER CORPORATION, and RAY H. DOWNER,
Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

This case presents the unusual picture of appellees' disagreeing with the District Judge as to the proper basis for the latter's order under appeal herein and seeking to sustain that order on completely divergent grounds. The learned District Judge ruled that appellant's Sixth Counterclaim was not justiciable because it is neither a compulsory nor permissive counterclaim. It is not compulsory because there was another action pending. It is not permissive because it would be a compulsory counterclaim but for the other pending action. Appellees apparently do *not* agree with this analysis of the problem for they do not present any substantial argument to support it and frankly state to this Court that the District Court should be sustained if there is any valid basis for the order. Appellees argue that the counterclaim is not

justiciable because its adjudication would require the presence of a third party over whom the District Court could not acquire jurisdiction. The following together with appellant's opening brief will show that neither position is tenable.

SUMMARY OF ARGUMENT.

I. Appellees' statement of the case is incorrect in that it assumes facts not in the record.

II. R. E. White is not an indispensable party. Further, even if he is indispensable there is nothing in the record to indicate that the District Court could not acquire jurisdiction over him.

III. Cases cited by appellees are not in point.

I. APPELLEES' STATEMENT OF THE CASE IS INCORRECT.

Appellees, in an abortive attempt to support the District Court's order, assert that there are certain facts *inherent* in the District Judge's ruling. This assertion is *not* supported by the record. In the first place, the record contains the learned District Judge's memorandum opinion in which he sets forth fully and explicitly the basis for the order of dismissal. It is true that the Sixth Counterclaim arises out of the transaction that is the subject matter of appellees' claim; it is true that at the time the action was commenced the counterclaim was the subject to another pending action. These facts are *not inherent* in the District Judge's reasoning, they are explicit and are the only bases for the order of dismissal.

It is *not* inherent in the District Judge's order that the Sixth Counterclaim requires the presence of third parties of whom the court could not acquire jurisdiction. First, the District Judge was explicit as to the reasons for his order. If the order had been based upon such a fact as asserted by appellees, that fact would have been commented on by the District Judge either in his memorandum or in the order itself. The absence of *any* comment on the asserted fact shows that the District Judge *did not* so find and such a finding is not inherent in his order as asserted by appellees. Second, and by far more important, there is simply *no* evidence in the record to support such a fact.

The District Judge in his memorandum opinion gives an exhaustive analysis of his view of the problem. That analysis is set forth in full on pages 28 to 31 of the transcript of record. At no place in that memorandum is there any hint that the court deemed that it could not acquire jurisdiction over White. To the contrary, the learned District Judge rules that the Sixth Counterclaim was not compulsory because "at the time the action was commenced the claim was the *subject of another action pending*" (pp. 29-30, emphasis added); it was not permissive because it "would, in the opinion of the court, arise out of the same transaction which forms the subject matter of the main action. . . ." (p. 30). Further, the learned District Judge expressly stated that the Sixth Counterclaim "could qualify as a compulsory counterclaim but for the fact that it is presently asserted in a pending State Court action." (p. 31). Thus, does the opinion completely negate appellees' assertion.

There is good reason for the failure of the District Judge to base his ruling upon an inability to acquire jurisdiction over White. That reason is that the evidence simply does not support such a fact. When Rule 13(a) speaks of a person over whom the court cannot acquire jurisdiction, it does not mean jurisdiction in the sense of diversity or presence of a federal question but *personal jurisdiction.*

In *United Artists Corporation v. Masterpiece Production* (C.A. 2 1955), 221 F. 2d 213, a counterclaim was filed joining a citizen of the same state as defendant Masterpiece. The District Judge had dismissed the counterclaim as permissive and not supported by independent federal jurisdiction. The court held the counterclaim to be compulsory and discussing the very argument raised by appellees said:

> "Jurisdiction over compulsory counterclaims is ancillary to the original jurisdiction of the district court. *Moore v. New York Cotton Exchange,* supra, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750; *Hartley Pen Co. v. Lindy Pen Co.,* D.C.S.D. Cal., 16 F.R.D. 141; *Lewis v. United Air Lines Transport Corp.,* D.C. Conn., 29 F. Supp. 112; and see Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L.J. 393, 418; Note, the Ancillary Concept and the Federal Rules, 64 Harv. L. Rev. 968; Dobie & Ladd, Cases and Materials on Federal Jurisdiction and Procedure 291-301 (2d Ed. 1950); Hart & Wechsler, The Federal Courts and the Federal System 942, 943 (1953). That means that, at least as to the original parties, no independent jurisdictional basis for the counterclaim need be shown. The issue now before us is whether this same principle should carry over

to cover third parties joined to the counterclaim. This involves an examination of F.R. 13(h).

F.R. 13(h) provides: 'When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or crossclaim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.' While a few district courts have limited this provision to indispensable parties, see *Kuhn v. Yellow Transit Freight Lines,* D.C.E.D. Mo., 12 F.R.D. 252; *Edwards v. Rogers,* D.C. E.D.S.C., 120 F. Supp. 499, the majority view, which we believe to be the better one, has been that joinder of all necessary parties is authorized. *Carter Oil Co. v. Wood,* D.C.E.D. Ill., 30 F. Supp. 875; *Pierce Consulting Engineering Co. v. City of Burlington, Vt.,* D.C. Vt., 15 F.R.D. 23; *United States v. Milhan,* D.C. E.D. N.Y., 15 F.R.D. 459; *General Cas. Co. of America v. Fedoff,* D.C.S.D. N.Y., 11 F.R.D. 177; *United States v. Dovolis,* D.C. Minn., 105 F. Supp. 914. * * *

We conclude that, in the case of a counterclaim which is compulsory, ancillary jurisdiction should extend to additional parties, regardless of an ensuing lack of diversity. This is the position taken by the commentators, Shulman and Jaegerman, Some Jurisdictional Limitations on Federal Procedure, supra, 45 Yale L. J. 393, 418, and the few courts which have ruled on the question. Carter Oil Co. v. Wood, supra, D.C.E.D. Ill., 30 F. Supp. 875; King v. Edward B. Marks Music Corp., D.C.S.D.N.Y., 56 F. Supp. 446; and see Black v. London Assur. Co. of London, England, D.C.W.D.S.C., 122 F. Supp. 330, where the court arrived at the desired result through realignment of

> the parties. We ourselves have come to the same conclusion in the past on the similar issue of venue requirements for additional defendants, see Lesnik v. Public Industrials Corp., supra, 2 Cir., 144 F. 2d 968, and with respect to impleader of third-party defendants under F.R. 14. Friend v. Middle Atlantic Transp. Co., 2 Cir., 153 F. 2d 778, 779-780, certiorari denied 328 U.S. 865, 66 S. Ct. 1370, 90 L.Ed. 1635. A liberal attitude toward the inclusion of parties is a necessary concomitant to the liberalized third-party practice authorized by the Federal Rules of Civil Procedure. The presence of these defendants is necessary to a complete adjudication of the issues involved in this litigation, which should not be retried at another time in another forum.
>
> Nothing in F.R. 13(a) compels a different result. True, that rule excludes from its definition of compulsory counterclaims those which require for their adjudication 'the presence of third parties of whom the court cannot acquire jurisidiction.' *This restriction should be limited to cases of inability to obtain personal jurisdiction over the additional defendants.*" * * * (Emphasis added.)

Further, this court has held that if the District Court has jurisdiction over the claim, it has jurisdiction over a counterclaim arising therefrom, notwithstanding that there are *no* independent grounds for Federal jurisdiction. (*Safeway Stores, Inc. v. Dunnell* (C.A. 9 1949), 172 F. 2d 649, *cert. den.*) This is true even though federal jurisdiction depends upon diversity of citizenship of the parties. In *Carter Oil Co. v. Wood* (E.D. Ill.), 30 F.S. 875, where the jurisdiction was based upon diversity of citizenship, the defendant interposed a counterclaim

against a citizen of the state of which the defendant was a citizen. It was held that no diversity of citizenships was required. The same result is reached in *The United States to Use of Foster Wheeler Corp. v. American Surety Co.* (S.D.N.Y. 1938), 25 F.S. 700 where the court said:

> "While it is true that because of lack of diversity of citizenship the intervening defendant could not sue the use plaintiff in this Court on the facts alleged in its counterclaim if these facts were set forth in an independent suit yet this fact does not deprive this Court of jurisdiction. The main action is brought under the statute of the United States (40 USC Sec. 270b); to this complaint must be set up all counterclaims arising out of the same transaction. Under such circumstances no independent jurisdiction is necessary for the assertion of the counterclaim (defective material)".

In *Abel v. Brayton Flying Service* (C.A. 5—1957), 248 F. 2d 713 judgment had been entered for plaintiff Brayton Flying Service. On appeal, defendant argued that one Brayton was an indispensable party who if joined would destroy the diversity of citizenship basis of jurisdiction. The court held that Brayton was not indispensable and further that defendant was not prejudiced by his absence. "Any relief to which Abel might have been entitled against Brayton arose out of the transactions which formed the subject matter of the suit. *A counterclaim for such relief would have been auxiliary to the action of which the District Court already had jurisdiction and needed no independent ground to support it.*" (p. 716) (Emphasis added.)

In *Rosenthal v. Fowler* (S.D.N.Y. 1952), 12 F.R.D. 388, which was not a diversity case, the court stated the rule as follows:

> "If a counterclaim is compulsory, the same jurisdiction which supports the main claim will also support the counterclaim."

Indeed this Court in *Northeast Clackamas C.E. CO-OP v. Continental Casualty Co.* (C.A. 9 1955) held in a parallel situation that diversity jurisdiction once acquired is not destroyed "by the intervention of a dispensable party of the same citizenship as the original plaintiff, if such intervention be without collusion and authorized by procedural rules" (p. 332). The *Foster Wheeler* case cited above is relied upon as authority. The court also suggests that it would follow the unanimous holdings of all Courts of Appeals which have considered the problem presented herein when it states, "other cases to the same effect although dealing with jurisdiction of claims asserted by parties brought in under Rules 13 and 14 are * * * (citing cases)" (p. 332).

To the same effect see *Moore v. New York Cotton Exchange*, 280 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750; *Dewey, etc. v. Johnson, etc.* (E.D.N.Y. 1939), 25 F.S. 1021; *United Artists Corp. v. Grinieff* (S.D.N.Y. 1954), 15 F.R.D. 395; *U. S. v. Rogers & Rogers* (S.D. Cal. 1958), 161 F.S. 132.

Diligent research has failed to turn up a single case in which a federal court has held that diversity jurisdiction once acquired is destroyed by joining a third party as party defendant to a compulsory counterclaim under Rule 13(a). The holdings of the reported decisions are unanimous to the contrary.

II. R. E. WHITE IS NOT AN INDISPENSABLE PARTY. FURTHER, THE DISTRICT COURT CAN ACQUIRE JURISDICTION OVER WHITE.

Appellees argue (1) that White is an indispensable party and (2) that joining White would destroy diversity of citizenship and divest the District Court of jurisdiction. However, the *only* facts cited in support of these allegations is an affidavit in support of a motion filed by appellant to stay action in the District Court because of another action pending in the State Court. *First,* that affidavit is *not* part of the record before this Court. Appellees have had sufficient time to make an appropriate motion under Rule 75 to have that affidavit and any other documents included as part of the record. Their failure to so do precludes any argument on their part based upon such document (*Bullen v. de Bretteville* (C.A. 9 1956) 239 F. 2d 824). *Second,* the *only* thing established by that affidavit is that White had commenced an action in the State Court and that appellant had cross-complained in that action asserting the same cause of action against appellees but also joining White as a joint tort-feasor. The record cited and relied upon by appellees does not even establish that White is a citizen of the State of California. Appellant, however, concedes that the record before this Court and the District Court would support by inference a finding that White is a resident of the State of California.

The record thus establishes at most that White is a resident of the State of California and that at the commencement of this action there was an action pending in the State Court which had the same subject matter as that asserted in the Sixth Counterclaim. There is no evidence

whatsoever in the transcript or the portion of the record in the District Court cited by appellees or any portion of the record in the court below to support an assertion or a finding that the District Court could not obtain personal jurisdiction over White. In view of the authorities cited above, the fact that White was a citizen of California is immaterial since diversity jurisdiction attached in the principal action and *would not be divested* if White were joined.

As a sidelight to this case, it is interesting to note that the District Judge who heard appellant's motion to stay the action in the District Court pending determination in the State Court referred to by appellees *denied appellant's motion.*

Further, White is not an indispensable party. As pointed out in appellant's opening brief, the Sixth Counterclaim sounds in tort. Appellees are alleged to have converted the so-called Gardner Field Assets. The answer sets up only a denial of that allegation. It may be that White is a joint tort-feasor and is equally guilty of the conversion alleged. This, however, does *not* make White an indispensable party. In appellant's opening brief the cases establishing this point are collected. Indeed the learned District Judge rejected the self-same argument made by appellees herein. Contrary to the assertion by appellees, the District Judge did not even seriously consider the possibility that White was indispensable. The District Judge was of the opinion that the pendency of another action prevented the Sixth Counterclaim from being justiciable in this action. Certainly if there were indispensable parties not joined the District

Judge would have said so. His failure to specify this as a ground is conclusive that he did not agree with appellees on this point.

III. CASES CITED BY APPELLEES ARE NOT IN POINT.

Appellees cite many cases to the effect that unless all parties on one side of the controversy have different state citizenship, from those on the other side, the requisite diversity does not exist. None of the cases cited involved a compulsory counterclaim to an action where the requisite diversity was established in the main action. Such cases as

Peninsular Iron Co. v. Stone, 121 U.S. 631;
Interstate National Bank etc. v. Luther, 221 F. 2d 382 (not 389);
Johnson v. Middleton, 175 F. 2d 535;
Telegraph Delivery Service v. Flausts Tel. Service, 12 F.R.D. 342,

are simply not in point. As pointed out above pages 4-8, the Supreme Court, this Court, as well as all other courts of appeals who have decided the issue are unanimous in their holding that once federal jurisdiction attaches, whether through diversity of citizenship or otherwise, a compulsory counterclaim will *not* divest the court of jurisdiction.

Appellees cite *Edmonston v. Sisk*, 156 F. 2d 300, to the effect that federal courts should not litigate matters better suited to state courts. Appellees fail to mention (1) that in that case the Court of Appeals affirmed the action of the District Court in so proceeding, (2) that in this case there is no factual predicate to support a statement

that this action "can be better settled in state court proceeding . . ." and (3) the law is well settled that

> "The pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction."

(*Ermentrout v. Commonwealth Oil Co.* (C.A. 5 1955), 220 F. 2d 527 at p. 530 and cases cited therein.) See also *Romero v. Wheatley* (C.A. 9 1955), 226 F. 2d 399.

The other cases relied upon by appellees are equally without merit.

CONCLUSION.

Appellees, citizens of California, commenced an action against appellant, a citizen of Nevada. The amount in controversy exceeds $3,000.00. The District Court thus acquired jurisdiction based upon diversity of citizenship. The Sixth Counterclaim is a compulsory counterclaim as defined in Rule 13(a). White is not an indispensable party and even if he were there is no evidence that the District Court cannot acquire personal jurisdiction over him. The District Court erred in dismissing the Sixth Counterclaim.

Dated, San Francisco, California,
September 28, 1959.

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